

Impeaching a President: how it works, and what to expect from it

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Metaphors abound in discussing how dramatically the issue of presidential impeachment has become central in U.S. political discourse: a simmering kettle boiled over, the Whistle Blower blew the lid off efforts to conceal scandalous (almost treasonous) presidential behavior. And everyone notes that what has been revealed is almost certainly matched by information that will come out sooner rather than later. It's not possible to summarize the state of play because relevant events occur almost hourly. Here I'll offer a primer on presidential impeachment in the United States for readers who might not be familiar with the basics, then offer some comments about presidential impeachment in comparative constitutional law.

The primer: procedure

Removal of a U.S. president has two stages, one in the House of Representatives the other in the Senate. Scholars take for granted that the courts have no role in presidential removal, drawing strong support from a case involving the removal by impeachment of a federal judge, *Walter Nixon v. United States*. (Including the first name is essential to avoid confusion about *Richard* Nixon's departure from office to avoid impeachment.) One occasionally hears hints that the norm-breaking Donald Trump and his lawyers might try to get the Supreme Court to intervene in an impeachment – Trump himself suggested that course in a tweet – but at present that seems quite unlikely.

The term *impeachment* refers to the first step in presidential removal. An impeachment is, technically, a finding by a majority of the House of Representatives that the president committed acts warranting removal. It is often analogized to an indictment. At present the Speaker of the House of Representatives has announced that the House would initiate an "impeachment inquiry." This refers to the procedure to be used to develop findings of impeachable conduct. The Constitution allows the House to develop whatever procedures it chooses for this process, and the standing rules of the House authorize each committee to develop (by majority vote) the procedures it will use. The announced initiation has relatively little legal significance, though it may strengthen the House's hand in pending litigation in which the president has challenged various requests for information from House committees; some scholars think that the permissible scope of presidential defenses against information disclosure – in particular, privileges against disclosure of communications within the executive branch ("executive privilege") – is narrower in connection with impeachment inquiries than in connection with ordinary congressional oversight of the executive branch. (Arguments about a narrower scope for a "national security information" privilege are somewhat weaker.)

If the House approves one or more articles of impeachment, the process moves to the Senate. Presided over by the Chief Justice, the Senate conducts a trial on the charges. The process is under the Senate's control, with the Chief Justice serving at most as something like a docket-controller or, perhaps, as someone who can make rulings, when asked, on contested questions of law. Even as to those question, though, the Senate majority would have the power to overrule its presiding officer. (There's been some speculation that the Republican majority leader of the Senate would not convene a trial or – more plausibly – that immediately after the Senate is convened he would move for a vote on the charges.) A President can be removed from office if “convicted” by a two-thirds vote. As a matter of political realism, under current circumstances either enough Republicans will have announced their intention to vote to remove Trump from office that he, like Nixon, would resign, or there would be a formal vote leading to an “acquittal” because not enough Republicans would join Democrats in voting to convict. (There's a lot of speculation about what the political consequences of an impeachment-plus-acquittal would be, but that's beyond my expertise.)

The Constitution states that the consequences of impeachment are merely removal from office (that is, it carries in itself no criminal consequences although subsequent criminal prosecution is not ruled out), although the Senate may declare separately that the removed president is disqualified from holding national political office in the future.

The primer: substance

According to the Constitution a president can be removed from office for “Treason, Bribery, or other high Crimes and Misdemeanors.” The Constitution provides a technical definition of treason: “levying War against [the United States], or in adhering to their Enemies, giving them Aid and Comfort.” This technical definition is narrower than contemporary common usage, in which “treason” is often used to refer to actions fundamentally inconsistent with a person's commitments to the United States. It's reasonably clear that nothing so far alleged about Trump's behavior counts as “treason” in the constitutional sense, if only because neither Ukraine nor Russia is an “enemy” of the United States, again understood in a technical sense.

“Bribery” is generally understood to be a payment to the recipient given in exchange for the recipient's performance of an act benefiting the donor. Again, Trump's actions don't fit that definition; they are more like extortion of an action from Ukraine in exchange for a personal benefit to the president. And, to the extent that extortion or unlawful campaign contributions might be thought to be a “high crime,” there's a non-trivial argument that the “bribery” provision precludes removal for other roughly similar financial misconduct by the president.

Practice in connection with impeachments of federal judges and the impeachment (but not conviction) of President Clinton suggests the possibility that something like an informal constitutional convention has emerged about the meaning of “high Crimes and Misdemeanors.” On this view the term means conduct that is, as I would put it, is “in the neighborhood” of criminal conduct even if actual criminality cannot be

proved because of, for example, technical deficiencies with respect to the proof of one element or the invocation of technical defenses. If the House and Senate adhere to this view, we will hear a great deal about whether Trump's conduct was criminal (was there an express *quid pro quo*, for example?) or close enough to criminal to justify removal.

Another understanding appears to have emerged rather rapidly in the current series of events. On this alternative view, removal is justified when the president engages in activities that are fundamental breaches of trust with the American people's expectation that the president will act, especially in connection with national security and foreign affairs, in the national interest rather than in the president's personal or merely political interest.

Comparative reflections

Presidential impeachment has recently occurred in several nations around the world. Wikipedia lists South Korea, Brazil, Ukraine, Paraguay, Lithuania, Indonesia, Peru, and the Philippines since 2000. The first comparative question is whether the best account of this phenomenon is simply that local circumstances arose in each nation leading to the impeachment – or, alternatively, whether there is some reasonably general account.

The most obvious candidate for the latter would almost certainly invoke populism and its effects on national party systems. On some accounts populism is based upon or leads to the discrediting of existing political parties and the rise of alternative parties devoted to completely eradicating those parties. This is sometimes described as a situation in which parties and politicians see an existential threat if their opponents remain in office. Another description is that populism leads to hyperpolarization of political parties (or, sometimes, coalitions). I suspect that there is something to this story, but it almost certainly is incomplete. For me, for example, the story fits Brazil quite imperfectly, in part because prior to President Rousseff's impeachment the party system was chaotic rather than hyperpolarized and because populism's rise appears to post-date the impeachment.

I am most familiar with the local story that can be told about the United States. It comes out of the school of political science known as American Political Development (APD). APD identifies relatively long-term "regimes" in the American constitutional order – for present purposes, the New Deal/Great Society regime and the Reagan Revolution regime. Sometimes a president happens to take office who represents the party "opposing" the regime. Such a president can be seen by the regime's supporters as illegitimate, and impeachment is placed on the political agenda.

Another possibility is this: A regime decays, for predictable reasons. As they do, alternatives are proposed. At some points the old regime is not yet dead but the new one has not yet been born. Presidential impeachments can be indicators of those situations. That appears to be the current situation in the United States. The Reagan Revolution was exhausted during George W. Bush's presidency.

The Obama presidency was something of an interregnum, although he and some of his most ardent supporters thought that he might initiate a new constitutional order. Trump came to office as the proponent of a replacement regime, the precise contours of which remain unclear. And Democrats see his election as opening up the possibility of ending the interregnum by initiating their own new constitutional order. Impeachment talks signals the impending end (perhaps) of the interregnum.

Conclusion

Over the hours during which I was working on this post further events have unfolded in the impeachment story. The best that can be done, I think, is to provide some orientation to the issues that may arise in the United States, and some ideas to provoke broader reflection. I hope to have done so here.

